



#13

Docket No. PRECI-P5366

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of: Walter W. Mosher, Jr., Michael L. Beigel, and Thomas P.
Mahoney

Serial No.: 09/033,832

Art Unit: 3628

Filed: March 3, 1998

Examiner: B. Green

For: IDENTIFICATION DEVICE HAVING REUSABLE
TRANSPONDER

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TRANSMITTAL LETTER OF BRIEF ON APPEAL

Sir:

Appellant is forwarding herewith for consideration of the Board of Appeals and for filing in the above-referenced application, the following:

- 1) Brief of Appellant with Certificate of Express Mailing - an original and two copies;
- 2) a Check in the amount of \$300.00 for filing fee for Brief of Appellant;
- 3) 3 copies each of prior art US Patents Nos.: 4,612,719; 4,718,374; and 5,140,946;
- 4) 3 copies of 1 USPQ 2d 1945, 1955 (N.D. Ill. 1986);
- 5) 3 copies of 50 USPQ 2d 1614, 1616-1617;
- 6) 3 copies of 1 USPQ 2d 1945, 1955-1957; and
- 7) a self-addressed, stamped postcard for acknowledgment of receipt of these materials.

The Commissioner is hereby authorized to charge payment of any additional filing fees required under 37 CFR 1.16 associated with this communication or

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Thomas P. Mahoney
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July 13, 2000

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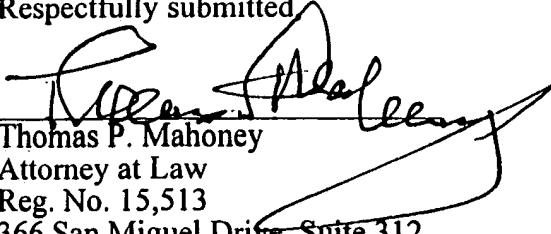
Docket No. PRECI-P5366

credit any overpayment to Deposit Account No. 13-1015. A copy of this transmittal sheet is enclosed.

Date:

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Respectfully submitted



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Enclosures

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Hon. Commissioner of Patents and Trademarks
Washington, D.C. 20231

BRIEF OF APPELLANT

Sir:

This is an appeal from the final rejection of the Examiner dated February 23, 2000 rejecting claims 19-25 and 27. Applicant cancelled claims 1-18 and 26 in prior amendments. This Brief is accompanied by the requisite fee of \$300.00 as set forth in §1.17(c).

REAL PARTY IN INTEREST (37 C.F.R. §1.192 (c) 1))

This application has been assigned to Precision Dynamics Corporation which is the real party in interest.

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Thomas P. Mahoney July 13, 2000
Thomas P. Mahoney, Reg. No. 15,643 DATE

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RELATED APPEALS AND INTERFERENCES (37 C.F.R. §1.92(c)(2))

There are no related appeals or interferences.

STATUS OF CLAIMS (37 C.F.R. §1.92(c)(3))

Claims 1-18 and 26 were cancelled.

Claims 19-25 and 27 are pending and are the claims under appeal herein.

STATUS OF AMENDMENTS (37 C.F.R. 1.192(c)(4))

On May 18, 2000, applicant filed an amendment to the Abstract and, in its Remarks, requested reconsideration of the Examiner's rejection of the amended claims.

An Advisory Action of May 25, 2000 states that the Abstract will be entered as amended in the May 18, 2000 Amendment, but that the applicant's arguments regarding the claims were "not deemed to place the application in condition for allowance" and do "not overcome the rejection. . . ."

SUMMARY OF THE INVENTION (35 C.F.R. 1.192(c)(5))

Applicant's invention relates to a radio frequency device 10 which includes disposable attachment means 12 for locating an object or an individual to be identified. The attachment means is a disposable wristband having opposite extremities (p. 6, l. 3-10).

Reusable securement means 14 is demountably engaged with the opposite extremities of the wristband to maintain the wristband in temporary relationship with a person or object. The reusable securement means is in a temporary operative relationship

with the extremities of the wristband and is separable from the wristband when the wristband is discarded (p. 6, l. 14-18). A radio frequency identification circuit 30 is embedded in the securement means for reuse with the securement means with a replacement wristband after the disposable wristband has been discarded (p. 7, l. 4-6). The wristband can be utilized in such environments as hospitals wherein the wristband is attached to the wrist of the patient. The radio frequency identification circuit is responsive to a reader which can read information in the circuit from a distance, thus ensuring that a patient will be properly identified. The circuit can also provide additional information such as medication, conditions to be treated, and the like.

Unfortunately, radio frequency identification circuits are quite expensive and materially add to the overall cost of an identification wristband. Therefore, the identification circuit has been incorporated in the securement means for the attachment portion of the wristband and the securement means is readily demountable from the association with the attachment means of the wristband and the disposable attachment means is discarded. The securement means can be subjected to a sterilizing process and is suitable for reuse with a new wristband and a new patient.

Therefore, the expense entailed in the purchase of the radio frequency identification circuit is spread over a large number of uses of the circuit embedded in the securement means. As a result, many of the identification problems encountered by hospitals and other organizations in identifying patients or personnel can be solved by the use of the radio frequency circuit incorporated in the reusable securement means.

Consequently, the use of the radio frequency device eliminates such major problems as misidentification of babies in hospital nurseries or the improper administration of medications to the wrong person, and the radio frequency identification device can be utilized over and over again, thus spreading the relatively high cost thereof over a number of usages.

ISSUES (37 C.F.R. 1.192(c)(6))

1. The Examiner has rejected claim 20 as indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention because there is no antecedent basis for "said circuit means."
2. The Examiner, in his advisory action, rejects claim 19 because it does not have an antecedent basis for "circuit means."
3. The Examiner rejects claim 25 under 35 USC 102(b) as anticipated by Hayes (U.S. Patent No. 4,718,374).
4. The Examiner rejects claims 19-25 and 27 under 35 USC 103(a) as unpatentable over de Jong (U.S. Patent No. 4,612,719) in view of Hayes (U.S. Patent No. 4,718,374).
5. The Examiner rejects claims 19-25 under 35 USC 103(a) as unpatentable over Pennock, et al. (U.S. 5,140,946) and Hayes.

GROUPING OF CLAIMS (C.F.R. 1.192(c)(7))

The claims can be grouped as follows: 19-20; 21-24; and 25, 27.

Claims 19-20 define a disposable attachment means for locating a radio frequency device on an object with the attachment means being a disposable wristband having opposite extremities.

Further defined is a reusable securement means demountably engagable with the opposite extremities of the wristband to maintain the wristband in temporary operative relationship with and being separable from said extremities when said wristband is discarded. A radio frequency identification circuit is embedded in the securement means for reuse with a replacement wristband after the disposable wristband has been discarded..

Claim 19 defines an antenna located in the wristband and communicating with the radio frequency circuit when the securement means is operatively connected to the wristband.

Claim 21 is somewhat broader than claims 19 and 20 in its definition of disposable attachment means having opposite extremities in a radio frequency identification device. Further defined are securement means separably connected to the opposite extremities of the attachment means for maintaining the attachment means in temporary operative relationship with an object or individual to be identified. Radio frequency circuit means is embedded in the securement means and is removable with the securement means from the attachment means for subsequent use with replacement attachment means. The claim is not limited to a wristband.

Claims 21-24 are directed to specific aspects of the radio frequency identification device and limit the device to various aspects of a disposable identification wristband.

The group of 25, 27 defines the subcombination of the reusable securement means being demountably engagable with opposite extremities of disposable attachment means and the body having radio frequency identification circuit means embedded therein.

ARGUMENT (35 C.F.R. 1.192(c)(8))

Issue 1. The Examiner has rejected claim 20 under 35 USC 112, second paragraph as indefinite for failing to point out and distinctly claim the subject matter which applicant regards as the invention, holding that, in claim 20, lines 2-3 there is no antecedent basis for said "circuit means."

In claim 19, a radio frequency identification circuit is defined as embedded in the securement means and is the only circuit defined in claim 19. It is respectfully submitted that the rejection is not well founded since it is manifest throughout the Examiner's rejections that the applicant has particularly pointed out and distinctly claimed the subject matter of the invention.

Issue 2. The Examiner has also rejected claim 19 in his advisory action stating that it does not have an antecedent for "circuit means". It is believed that the Examiner is referring to claim 19 in error and is intending to reiterate his rejection of claim 20.

Issue 3. Claim 25 has been rejected under 35 USC 102 (b) as anticipated by Hayes (U.S. Patent No. 4,718,374). The Examiner, in rejecting claim 25 on Hayes '374, holds that Hayes shows, in Figs. 1-5, a reusable securement means comprising a body

with securement portions and a radio frequency identification circuit means. The intended use of the device has not been given any patentable weight by the Examiner.

Preliminarily, Appellant points out that, for a prior reference to constitute an anticipation, it must adequately meet the terms of the claims interpreted in the light of the specification of the application. Moreover, a reference cannot be rebuilt or reoriented by the utilization of Applicant's teachings in an attempt to create an anticipatory structure.

A discussion of the criteria to be applied in anticipation rulings is set forth in Aqua-Aerobic Systems Inc. v. Richards of Rockford Inc., 1 USPQ 2d 1945, 1955 (N.D. Ill. 1986) as follows:

D. ANTICIPATION

The defense of anticipation or lack of novelty under 35 U.S.C §102 requires that the accused infringer show that a single prior art reference discloses each

and every element of the claim under consideration. The parties stipulate to this.

An analysis of the teachings of Hayes '374 indicates that they do not meet the language of claim 25. A radio frequency identification device 10 includes an attachment means 12 and a securement means 14. The securement means 14 is demountably secured to the attachment means by a boss 16 (p. 6, l. 3-7).

"The attachment means is constituted by the strap or body portion 18 of the wristband 10." (p. 6, l. 19-20).

The securement means 14 has an RF circuit 30, shown in phantom in Figs. 1 and 2 of the drawings, embedded therein (p. 6, l. 24-26).

Claim 25 defines reusable securement means having a body with securement portions thereupon. Hayes does not show a reusable securement means. The securement portions of the body, as defined in claim 25, are demountably engagable with opposite extremities of disposable attachment means. The head portion 46 of Hayes '374 is not demountably engagable with opposite extremities of disposable attachment means. Claim 25 further defines the body as having radio frequency identification circuit means embedded therein. There is no radio frequency circuit means embedded in the head portion 46 of Hayes.

It appears that the Examiner has deviated from the teachings of Hayes '374 in that Hayes shows a head portion 46 which is urged through a slit in the ear of an animal and a retaining member 24 is then urged over the head portion until it snaps into place at the end of the head portion. Hayes describes this action at Col. 6, l. 55-60, as follows:

“Thus, head portion 46 may be forced through the slot by resilient, outward deflection of rib portions 58, 59 which then resiliently inwardly deflect to engage abutment ledge means 56, 57 whereby the head portion 46 may not be withdrawn through the slot after assembly on the animal ear.”

Hayes clearly states that “the head portion 46 may not be withdrawn through the slot after assembly on the animal ear.” The language clearly does not support the Examiner’s statement “a reusable securement means.” Furthermore, nowhere in Hayes is there any statement regarding reusable securement means having securement portions engagable with opposite extremities of the disposable attachment means. In Hayes, the attachment means 24 and 46 are located at one end of the tag of Hayes.

Moreover, the securement means does not have radio frequency identification circuit means located therein. Since claim 25 includes the aforesaid limitations, it is respectfully submitted that the rejection of 25 on Hayes is not supported by the disclosures of Hayes. The Examiner, on page 4 of the action of February 23, 2000, goes so far as to state that "The attachment (24) could be cut off and the securement means removed from the animal. The securement would then be sterilized and attached to another animal, i.e. reused." He ignores the fact that, mutilated, Hayes would be un reusable.

It is manifest that there is no teaching in Hayes of reusable securement means with securement portions demountably engagable with opposite extremities of disposable attachment means with the body of the securement means having radio frequency identification circuit means embedded therein.

Issue 4. Claims 19-25 and 27 have been rejected under 35 USC 103(a) as being unpatentable over de Jong '719 in view of Hayes '374.

One of the most comprehensive treatments of the "hindsight trap" is found In Re Dembiczak, 175 F.3d 994, 50 USPQ2d 1614 (Fed. Cir. 1999).

At pp. 1616-1617 50 USPQ2d, the Federal Circuit begins its analysis as follows:

Our analysis begins in the text of section 103 . . . with the phrase "at the time the invention was made." For it is this phrase that guards against entry into the "tempting but forbidden zone of hindsight" . . . when analyzing the patentability of claims pursuant to that section. Measuring a claimed invention against the standard established by section 103 requires the oft-difficult but critical step of casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom in the field. . . . Close adherence to this methodology is especially important the case of less technologically complex inventions, where the very ease with which the invention can be understood may prompt

one "to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher."

Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references. . . . Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability -- the essence of hindsight. See, e.g., Interconnect Planning Corp. v. Feil, (Fed. Cir. 1985) ("The invention must be viewed not with the blueprint

drawn by the inventor, but in the state of the art that existed at the time.") In this case, the Board fell into the hindsight trap.

Rejections on the ground of obviousness are more extensively discussed in Aqua-Aerobic Systems Inc. v. Richards of Rockford, Inc., 1 USPQ 2d 1945, 1955-57 (N.D.Ill.

1986) where the court held as follows:

F. OBVIOUSNESS

"Obviousness" under 35 U.S.C. §103 is a question of law based on the underlying factual inquiries enumerated in *Graham v. John Deere Co.*, 383 U.S. 1 [148 USPQ 459] (1966). The relevant inquiries include: (1) the scope and content of the prior art; (2) the differences between the prior art and the claims at issue; (3) the level of ordinary skill in the art; and, (4) objective evidence of secondary considerations. *Id.* at 17 [148 USPQ at 466-467]. See *Bausch & Lomb, Inc.*, 796 F.2d at 447 [230 USPQ at 418-419].

The issue of obviousness is determined entirely by reference to a hypothetical "person having ordinary skill in the art." The actual inventor's skill is irrelevant to this inquiry. *Bausch & Lomb, Inc.*, 796 F.2d at 448 [230 USPQ at 419-420] (quoting *Standard Oil Co. V. American Cyanamid Co.*, 774 F.2d 448, 454 [227 USPQ 293, 297-298 (Fed. Cir. 1985)]).

The statutory emphasis is on a person of ordinary skill. Inventors as a class, according to the concepts underlying the Constitution and the statutes that have created the patent system, possess something -- call it what you will -- which sets them apart from the workers of ordinary skill, and one should not go about determining obviousness under § 103 by inquiring into what patentees (i.e. inventors) would have known or would likely have done, faced with the revelation of references.

Id. (emphasis in original).

In determining the obviousness of an invention, it is impermissible to pick and choose from any one reference only so much of it as will support a given position while excluding other parts necessary to the full appreciation of what such reference fairly suggests to one skilled in the art. *Bausch & Lomb, Inc.*, 796 F.2d at 448 [230 USPQ at 419-420] (quoting *In re Wesslau*, 353 F.2d 238, 241 [147 USPQ 391, 393] (CCPA 1965)).

When determining if a reference is within the scope of the prior art, the court must first determine if the reference is within the field of the inventor's invention. If it is not, the court must then determine whether the reference is reasonably pertinent to the particular problem facing the inventor. *Bausch & Lomb, Inc.*, 796 F.2d at 449 [230 USPQ at 420]. The art must have existed as of the date of the invention, presumably the filing date of the application. *Id.*

Obviousness cannot be established by combining the teachings of prior art references to produce the claimed invention absent some teaching or suggestion supporting

the combination. The teachings from different references can be combined to invalidate a patent only if there is some teaching or incentive to do so. *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 732 F.2d 1572, 1577 [221 USPQ 929, 932-933] (Fed. Cir. 1984).

It is improper to use the patent in suit as a guide through the maze of prior art references, combining the right references in the right way so as to achieve the results of the claims sought to be invalidated. *Orthopedic Equipment Co., Inc. v. United States*, 702 F.2d 1005, 1012 [217 USPQ 193, 199-200] (Fed. Cir. 1983).

The fact that a prior art reference can be modified to show the patented invention does not make the modification obvious unless the prior art reference suggests the desirability of the modification. An attempted modification of a prior art reference that is unwarranted by the disclosure of that reference is improper. *In re Gordon*, 733 F.2d 900, 902 [221 USPQ 1125, 1127] (Fed. Cir. 1984).

The claimed invention must be viewed as a whole. *Bausch & Lomb, Inc.*, 796 F.2d at 449 [230 USPQ at 420] (citing *Jones v. Hardy*, 727 F.2d 1524, 1527-1528 [220 USPQ 1021, 1023-1024] (Fed. Cir. 1984)). The proper test in analyzing the prior art is whether the prior art reference, taken as a whole, would have suggested the invention to an ordinary person skilled in the art. *Jones*, 727 F.2d at 1530 [220 USPQ at 1026].

It is improper to consider the differences between a patent claim and a prior art reference as the invention or even to regard the alleged improvement as the invention. This is due to the fact that while the difference may be deemed to be slight, it may also have been the key to success and to the advancement in the art resulting from the invention. *Jones*, 727 F.2d at 1528 [220 USPQ at 1024-1025]. It is irrelevant that all other aspects of the claim may have been well known in the art. *Id.*

There are six factors relevant to a determination of the level of ordinary skill in the art: (1) the educational level of the inventor; (2) the type of problems encountered in the art; (3) the prior art solutions; (4) the rapidity of innovation; (5) the sophistication of technology; and, (6) the educational level of active workers in the field. *Bausch & Lomb, Inc.*, 796 F.2d at 449-450 [230 USPQ at 420-421] (citing *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 697 [218 USPQ 865, 868-869] (Fed. Cir. 1983), *cert. denied*, 464 U.S. 1043 [224 USPQ 520] (1984)).

"Secondary considerations", when present, must always be considered. *Bausch & Lomb, Inc.*, 796 F.2d at 450 [230 USPQ at 420-421]. Such evidence includes commercial success, long felt but unresolved needs, and failed attempts. *Id.* (Citing *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 895-96 [221 USPQ 669, 674-676] (Fed. Cir.) *cert. denied*, 105 S.Ct. 187 (1984)).

Secondary considerations may establish that an invention apparently obvious in light of the prior art was not in fact obvious. Secondary considerations require a finding of nonobviousness if the obviousness of the subject matter as a whole is otherwise doubtful. *In re Sernaker*, 702 F.2d 989, 996 [217 USPQ 1, 6-7] (Fed. Cir. 1983).

The fact that all elements of an invention may have been old, or that some elements were new while others were old, is irrelevant. Virtually all inventions are combinations and virtually all are combinations of old elements. *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d at 698 [218 USPQ at 869-870].

...

It is important to guard against the use of hindsight when determining the obviousness or nonobviousness of an invention. *Panduit Corp. v. Dennison Manufacturing Co.*, 774 F.2d 1082, 1091-92 [227 USPQ 337, 342-343] (Fed. Cir. 1983). See *In re Deminski*, 796 F.2d 436, 443 [230 USPQ 313, 316] (Fed. Cir. 1986).

The major consideration here is whether there is any teaching of a reusable securement means having an RFID circuit embedded therein wherein the removable securement means is demountably connected to the attachment means which embraces or surrounds the object which has the RFID device mounted thereupon.

In neither Hayes nor de Jong is this concept considered. Mention has previously been made of the fact that, in Hayes, "the head portion 46 [securement means] may not be withdrawn through the slot after assembly on the animal ear." (col. 6, l. 59-60). Therefore the teachings of Hayes are clearly contrary to a thesis of the rejected claims which all, in one way or another, relate to reusable means demountably engagable with the opposite extremities of an attachment means to maintain the attachment means in temporary relationship with the object on which the attachment means is mounted.

Further, a radio frequency identification circuit is embedded in the securement means for reuse with the securement means. The teachings of de Jong add nothing to the teachings of Hayes since de Jong's are clearly directed to a holder 1 wherein a detection element 2 is imbedded. At the bottom of the holder, there is a flap 3 which clamps one of

the ends of a band 6. The other end of the band 6 is secured by a shear pin 10 (col. 2, l. 55-68 and col. 3, l. 1-7).

The attachment means is obviously the strap 6 and the securement means consists of the cam 7-8 and the shear pin 10, Figs. 1 and 2.

Manifestly, there is no provision of an RFID device in the securement means. This is true of all of the embodiments of the holder depicted in Figs. 4-9 of the drawings of de Jong. The securement means is always provided by the equivalent of the cam 7-8 and the attachment means by the strap 6. No RFID device can be found in any of them. All of the rejected claims include a limitation to the presence of the radio frequency identification circuit embedded in the securement means for reuse with the securement means with a replacement attachment means or wristband. Neither de Jong nor Hayes shows this combination.

Issue 5. Claims 19-25 have been rejected under 35 USC 103(a) as unpatentable over Pennock, et al. (U.S. Patent No. 5,150,946) in view of Hayes (U.S. Patent No. 4,718,374). Pennock '719 does not teach the removable and reusable relationship of the securement means with the RFID circuit in it after dismounting it from the attachment means.

The securement means of Pennock is a pet collar (col. 1, l. 52) but there is no teaching of an RFID device permanently embedded in the securement means for intended reuse of the RFID circuit with additional attachment means.

All Pennock teaches is the incorporation of a removable battery 14 in a battery housing 10 (col. 2, l. 31-34) and which can be replaced in the battery housing 10 when it has been exhausted. Further, there is no teaching of the identification of the pet upon which the pet collar is secured, but merely the perception of the pet in the dark.

APPENDIX (35 C.F.R. 1.192(c)(9))

Applicant's claims on appeal are presented below as amended through December 16, 1999.

19. A radio frequency device comprising:

disposable attachment means for locating said device on an object or an individual to be identified, said attachment means being a disposable wristband, said wristband having opposite extremities;

reusable securement means demountably engagable with the opposite extremities of said wristband to maintain said wristband in temporary operative relationship with and being separable from said extremities when said wristband is discarded; and

radio frequency identification circuit embedded in said securement means for reuse with said securement means with a replacement wristband after the disposable wristband has been discarded.

20. The device of claim 19 in which an antenna is located in said wristband and communicates with said circuit means when said securement means is operatively connected to said wristband.

21. A radio frequency identification device comprising:

disposable attachment means having opposite extremities;

securement means separably connected to said opposite extremities of said attachment means for maintaining said attachment means in temporary operative relationship with an object or individual to be identified; and

radio frequency identification circuit means embedded in said securement means and being removable with said securement means from said attachment means for subsequent use with replacement attachment means.

22. The device of claim 21 in which said attachment means is a disposable identification wristband, whose extremities are demountably secured to said securement means, said securement means and radio frequency identification circuit means being reusable with a replacement wristband after having been separated from operative relationship with said wristband.

23. The device of claim 21 in which said attachment means is an elongated wristband and said wristband has opposite extremities, said securement means having opposite extremities receivable in the opposite extremities of said wristband to maintain said wristband, said securement means and said radio frequency identification circuit means in operative relationship with the object or individual to be identified.

24. The device of claim 23 in which antenna means is located in said wristband and communicates with said radio frequency circuit means.

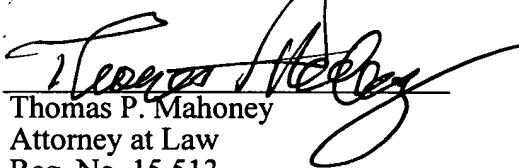
25. Reusable securement means having a body with securement portions thereupon, said securement portions being demountably engagable with opposite extremities of disposable attachment means to maintain said attachment means on an object or individual, said body having radio frequency identification circuit means embedded therein.

27. The securement means of claim 25 in which said body has a recess for the reception of said opposite extremities of said attachment means.

Date:

7/13/00

Respectfully submitted,



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